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No. 85-1259

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION

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QUESTIONS PRESENTED

1. Whether the defendant in a Government-instituted civil action in a Federal District Court to recover substantial civil penalties (in this case in excess of $300,000) under a federal statute is entitled under the Seventh Amendment of the Constitution to a trial by jury.

2. (a) Whether equitable estoppel runs against the Government.

(b) Whether equitable estoppel precludes the recovery of civil penalties by the Government under the Clean Water Act when a citizen requests a jurisdictional inspection by the agency charged with enforcement, is led to believe that the agency does not have jurisdiction and that a permit is not required, proceeds with his development of lots under constant surveillance by the agency, is never advised that his activities have come under the agency's jurisdiction or are otherwise unlawful notwithstanding regulations requiring the agency to so inform the citizen, and is then punished five years later after virtually all of the lots have been sold to others.*

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* While we note with grave concern the treatment the petitioner has received at the hands of his government, we are constrained by our policy to address only the deprivation of the Seventh Amendment right to trial by jury.

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INTERESTS OF AMICUS CURIAE

Amicus curiae is a non-profit membership organization dedicated to the advancement of the legal profession and the protection of the legal rights of all citizens of the Commonwealth of Virginia. The more than 2,600 members of the Virginia Trial Lawyers Association regularly participate in trials in state and federal courts. Individually and collectively amicus curiae is concerned for and intimately involved in the protection of litigants' constitutional rights, including their right to trial by jury. The Association is compelled to speak out in this case which has resulted in the denial of the right to trial

by jury to petitioner, a citizen of our state, by a Federal District Court sitting in our state.

Members of amicus curiae and the citizens they have represented in the past, those they currently represent, and those they will represent in the future have a substantial interest in the preservation of the right to trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States. They will be adversely affected by a judicial decision which removes from this guarantee bestowed upon us by our forefathers the right of a citizen to be tried by a jury of his peers when government seeks to impose substantial civil penalties for the violation of a statute. The civil penalty provisions of the statute applicable in this case, and similar statutes of recent origin, can produce an end result just as devastating to the litigant as prosecution under the criminal penalty provisions.[1] It makes little difference that the citizen cannot be deprived of his liberty, when his government can destroy him economically and, as a result, he loses all of his worldly possessions.

INTRODUCTORY STATEMENT

The Seventh Amendment to the Constitution of the United States guarantees the right of trial by jury in suits at common law where the value in controversy exceeds twenty dollars. The Court of Appeals in a two to one decision held that petitioner did not have a Seventh Amendment right to trial by jury in this case in which civil penalties in the amount of $325,000.00 were imposed by the District Court.[2] (Pet. App. 8a) Judge

[1] Petitioner cites to approximately 195 federal statutes enacted since October 18, 1972 which permit the government to seek civil penalties in the courts (Pet. 16 and Pet. App. 82a-100a).

[2] We have accepted petitioner's explanation that because he cannot restore the ditch to its original condition, having sold the property to others prior to any government action, his civil penalty will be $325,000.00 and not $75,000.00. (Pet. 7 note 9)

Warriner, dissenting, would have held the Seventh Amendment applicable and a jury trial required. (Pet. App. 19a-25a) Regrettably, the majority decision was not examined by the full court. The Petition For Re-Hearing *En Banc* was denied by a six to five vote. (Pet. App. 26a) It would be even more regrettable if this Court should decline to grant Certiorari to determine this important constitutional issue in view of the obvious lack of unanimity in this court below. Amicus curiae submits that an issue of such fundamental constitutional importance requires the attention of this Court.

REASONS FOR GRANTING THE PETITION

The Petition of Edward Lunn Tull should be granted because the decision of the court below frustrates the clear intent of the Seventh Amendment to the Constitution of the United States and several prior decisions of this Court. Of more immediate consequence, the decision is in direct conflict with the decisions of other Circuits, and will severely hamper the ability of trial lawyers to properly advise and represent their clients when confronted with the issue of the right to trial by jury in cases involving civil penalties. While these grounds are amply explained in the petition, amicus curiae submits this brief to amplify several points, primarily the impact of the Court of Appeals decision on the members of amicus and the citizens of the Commonwealth of Virginia whose interests it represents.

Unless this Court grants certiorari and resolves the conflict in the Circuits which this case creates, the trial bar and trial courts will be thrown into confusion and chaos. The "law of the circuit doctrine" will require a jury trial in civil penalty cases in some Circuits while requiring its denial in others. Under the holding of the instant case, jury trials will be denied in the Fourth Circuit and in the Eleventh Circuit which relied upon

the holding in this case.[3] Federal Courts in the Second Circuit and Ninth Circuit will be required to provide a trial by jury in civil penalty cases.[4] In the Circuits that have yet to opt for their particular constitutional interpretation, there will be no certainty under the law. Trial judges, trial lawyers and litigants will be forced to rely upon the time-consuming and expensive processes of appeal to formulate the rule on this issue in each Circuit. The legal quagmire that is likely to result can be avoided by this Court's resolution of the issue.

We believe that the majority of the Court of Appeals has erroneously interpreted prior decisions of this Court. The majority of the panel in the court below held that petitioner was not entitled to a jury trial because this Court in *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), left open the question of whether the Seventh Amendment has any application at all to government litigation. *Id.* at 449 n.6 (Pet. App. 9a). Even assuming that the Seventh Amendment applies to government litigation, the majority held that the trial court was exercising statutorily conferred equitable power and that the assessment of civil penalties intertwines with the imposition of traditional equitable relief. (Pet. App. 9a).

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[3] *United States v. MCC of Florida, Inc.*, 772 F.2d 1501 (11 Cir. 1985) (no right of jury trial when damages and civil penalties are sought under the Clean Water Act). Petition for Certiorari filed January 30, 1986, No. 85-1202.

[4] *United States v. J.B. Williams Co.*, 498 F.2d 414 (2nd Cir. 1974) (jury trial required when government seeks civil penalty and statute is silent as to the right of jury trial); *FAA v. Landy*, 705 F.2d 624 (2nd Cir.), cert. denied, 464 U.S. 895 (1983) (civil fine not to exceed $1,000 for each violation under the Federal Aviation Act 49 U.S.C. § 4171(a)(1), trial by a jury); *Connolly v. United States*, 149 F.2d 666 (9th Cir. 1945) (appellants could have demanded a jury trial when statutory penalty imposed even if they waived jury trial on issue of damages).

The majority's reliance upon a question left open by this Court when denying petitioner's right to a jury trial, of itself, should be sufficient reason for this Court to grant certiorari. The majority's reliance upon precedent which established at most the limited proposition that Congress may vest in an administrative agency the right to find facts and assess a penalty without violating the Seventh Amendment disregards the facts of this case, and is clearly erroneous. In *Atlas Roofing Co.*, this Court held that the Seventh Amendment does not "prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." 430 U.S. at 450. In *Curtis v. Loether*, 415 U.S. 189, 194 (1974), this Court made it clear that its prior decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), simply meant that the Seventh Amendment is generally inapplicable to administrative proceedings. The facts of the instant case do not support the majority's application of the law. Suit was initiated against petitioner in the District Court, not in an administrative agency (Pet. App. 67a-74a). Congress did not provide for factfinding to be done or civil penalties to be assessed by an administrative agency. To the contrary, Congress required in 33 U.S.C. § 1319(b) that suits under the Clean Water Act be brought in the District Courts. (Pet. App. 76a-77a) The District Court, not an administrative agency, imposed the $325,000.00 civil penalty against petitioner. This Court made it clear in *Atlas Roofing Co.* that under facts similar to those here, a jury is required.[5] 430 U.S. at 460.

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[5] "That case indicates, as had *Hepner v. United States*, 213 U.S. 103, 53 L.Ed. 720, 29 S.Ct. 474 (1909), *that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary in which event Jury Trial would be required*, see also *United States v. Regan*, 232 U.S. 37, 58 L.Ed. 494, 34 S.Ct. 213 (1914), but that the United States could also validly opt for administrative enforcement, without judicial trials." *Atlas Roofing Co.*, 430 U.S. at 460 (emphasis supplied).

To the extent that the majority of the court below analogized the civil penalty imposed in this case to "traditional equitable relief" or a "package" of remedies permitting the jury trial right to be circumvented (Pet. App. 9a-10a) it is clearly wrong. No authority can be found that the imposition of a civil penalty in the amount of $325,000.00 is equitable relief.[6] To the contrary, prior decisions of this Court and other courts leave little doubt that civil penalties are not equitable relief but are legal relief.[7]

Even the District Court recognized that it was sitting both in equity and law (Pet. App. 59a). A civil penalty of such a substantial amount is most closely analogous to punitive damages in a civil case. This Court in *Curtis v. Loether*, 415 U.S. at 195, required a jury trial when punitive damages were awarded.[8] The District Court in this case made it clear that it intended the civil penalty to be punitive (Pet. App. 61a).

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[6] The failure to cite authority for this proposition in the opinion of the majority of the Court below is significant. (Pet. App. 10a) We believe that no authority is cited because it simply does not exist. Perhaps the majority below mistakenly believed that the District Court was providing restitution. However, restitution is not the same as a civil penalty. See *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

[7] *Hepner v. United States*, 213 U.S. 103 (1909) (dictum); *United States v. Regan*, 232 U.S. 37 (1914) (dictum); *Porter v. Warner Holding Co., supra* (dictum); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, supra* (dictum); *United States v. J.B. Williams Co., supra; Connolly v. United States*, 149 F.2d 666 (9th Cir. 1945); J. Moore, J. Lucas and J. Wiches, *Moore's Federal Practice* paragraph 38. 31[1] (2d ed. 1985), pp. 38-235, 236.

[8] "As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." *Curtis v. Loether*, 415 U.S. at 195-196.

Historically, courts of equity had jurisdiction only to address those cases for which no legal cause of action was available. This Court has held that the equity jurisdiction of the federal courts is limited to those equitable causes of action existing when the Constitution was enacted. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164-166 (1939). However, the Seventh Amendment applies to actions unknown at the time that the Amendment was adopted and applies to new legal rights and legal remedies created if they are in the nature of actions triable under the common law, *i.e.*, in contradistinction to equitable rights. *Curtis v. Loether*, 415 U.S. at 193. Accordingly, it is actions in equity which are limited at the time of the Amendment, and not common law actions. The majority opinion failed to appreciate this distinction and properly recognize that a civil penalty is a legal rather than an equitable remedy (Pet. App. 8a).

To the extent that the majority of the court below would deny a jury trial because the civil penalty provision "intertwines with the imposition of traditional equitable relief," the majority is simply wrong. The statute itself in 33 U.S.C. § 1319(b) makes a specific distinction between the equitable relief permitted and the civil penalty provisions found in 33 U.S.C. § 1319(d). Nothing in the legislative history supports a holding that the civil penalty provisions found in the statute are to be construed as "traditional equitable relief," nor is there any legislative history that would imply that a jury trial is to be denied when the government seeks civil penalties under the Clean Water Act. Absent any such clear direction from Congress, the courts are required to analogize the new legal duty and remedy sought to those "typically enforced in an action at law." *Curtis v. Loether*, 415 U.S. at 195. This Court has by clear implication left no doubt that civil penalties are not equitable in nature, are readily distinguishable from restitution, and therefore require a trial by jury. *Porter v. Warner*

Holding Co., 328 U.S. at 402. To the extent that the decision of the majority of the court below may be read to deny a jury trial when equitable and legal relief in the form of civil penalties are mixed, it would be diametrically opposed to this Court's prior decisions.[9]

We note with concern petitioner's analysis of the proliferation of recently enacted federal statutes which provide for the imposition of civil penalties in the federal courts (Pet. App. 82a-100a). Even without such a substantial increase in the number of statutes providing for civil penalties, the sheer magnitude of the penalty imposed in this case is, we believe, sufficient to invoke the Seventh Amendment's protection. As pointed out by Judge Warriner in his dissent, "there simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of the citizenry of this nation" (Pet. App. 25a). It is reasonable to assume that if petitioner could choose between a civil penalty of $325,000.00 or six months and one day in jail, his choice would be jail. Each day in jail would be worth $1,795.58. No one would seriously argue that the Sixth Amendment would not entitle petitioner to a jury trial if he were imprisoned for more than six months for the violation. *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974). Is it not then an incredible argument that he can be denied a jury trial when the imposition of a civil penalty could ruin him financially for the rest of his life but could not be denied trial by jury if his punishment were to spend six months and one day in jail?

In the instant case petitioner found himself at odds with the overwhelming power of a government that sought "civil penalties" that could have totalled more

[9] *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and *Ross v. Bernhard*, 396 U.S. 531 (1970).

than 22 million dollars (Pet. 6, note 8). What real difference would it have made to the petitioner if the government had sought a fine under the criminal penalties provided for in the statute, 33 U.S.C. § 1319(c), which could have made him liable for the payment of 55 million dollars? Given the ability to obtain civil penalties of such astronomical amounts, the enforcement efforts of the government will surely be limited to the collection of a civil penalty.

By opting for the civil penalty provisions of a statute, the government avoids the more onerous requirements which are encountered in a criminal prosecution with its obvious Sixth Amendment requirement for a jury trial. When the Fifth Amendment no longer applies, the government can, with the use of pre-trial discovery, require the defendant to produce documents and testify against himself in the civil case. The government no longer must concern itself with the presumption of innocence. Its case is measured by the less difficult preponderance of evidence standard rather than proof beyond a reasonable doubt. If the defendant's last protection, trial by jury, is eliminated, the technical distinction between a civil suit to enforce a substantial civil penalty and a criminal prosecution will be of little importance to the defendant. The defendant would, in fact, be better off if he were prosecuted criminally. A criminal prosecution would provide him with more constitutional protection and if the government prevails and destroys him financially, at least he will be provided food and shelter while he is imprisoned. The need for the Seventh Amendment's protection is known to all trial lawyers, and candidly admitted by one of this Court's former brethren.[10]

[10] "In our own times, the jury often has served as a deterrent to ambitious officials who wish to crush before them those who stand in their way. From where I sit reviewing some 3,500 cases a year, I often see the arbitrariness of a judge sitting as the thirteenth juror. One can easily imagine the extent of his severity when he

Amicus curiae believes that its unwavering commitment to the Seventh Amendment's right to trial by jury has substantial historical support. Nearly 200 years ago while extricating themselves from an oppressive government and forming a new government, our forefathers found the right of trial by jury in civil cases so important that they refused to ratify the Constitution until the Seventh Amendment was included.[11] Insistence upon inclusion of the Seventh Amendment was the culmination of a consistent belief in its necessity, and its deprivation by the tyrant is found in the Declaration of Independence.[12] Its inclusion in a document originally drafted by a Virginia planter-lawyer and signed by 56 leaders of the time, 24 of whom were lawyers and 2 of whom were judges, dispels the notion that it was insignificant and unnecessary. Petitioner and those similarly situated find themselves no less in need of the Seventh Amendment's protection than their forefathers.

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sits alone." *The American Jury: A Justification*, Tom C. Clark, Associate Justice, Supreme Court of the United States, 1 Val. L. Rev. 1, 4-5 (1966).

[11] "The objection to the plan of the convention, which has met with most success in this state is relative to *the want of a constitutional provision for the trial by jury in civil cases.*" *The Federalist on the New Constitution*, Hamilton, Madison and May, written in the year 1788, Hallowell 1831, p. 411 (emphasis supplied).

[12] ". . . For depriving us, in many cases, of the benefits of Trial by jury:" Declaration of Independence.

CONCLUSION

For these reasons and those stated in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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